Supreme Court, U.S.
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No. 01-353

IN THE
Supreme Court of the United States

LINZ AUDAIN,

Petitioner,

v.

THE AMERICAN UNIVERSITY, *et. al.*,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether it constituted an abuse of discretion for the courts below to deny petitioner's motion for reconsideration – where the motion was based on *Reeves* v. *Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000) – in circumstances where *Reeves* does not apply because petitioner failed to bring forward any evidence that respondents' four nondiscriminatory reasons for its employment action were not worthy of belief.

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

Petitioner Linz Audain was the plaintiff-appellant below. Respondents, The American University, and the American University Washington College of Law, were the defendants-appellees below. Neither The American University nor the American University Washington College of Law have a corporate parent or a publicly held company owning 10 percent or more of its stock.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT	ii
INTRODUCTION	1
COUNTERSTATEMENT	3
REASONS FOR DENYING THE WRIT	8
I. THE DECISION BELOW DOES NOT CONFLICT WITH THIS COURT'S DECISION IN *REEVES*	8
II. THE DECISION BELOW DOES NOT CONFLICT WITH THE DECISIONS OF THE OTHER COURTS OF APPEAL	11
III. THIS CASE INVOLVES NO UNSETTLED ISSUE OF FEDERAL LAW	13
CONCLUSION	14

TABLE OF AUTHORITIES

	Page
CASES:	
Ackerman v. *United States*, 340 U.S. 193 (1950).....	6
Agostini v. *Felton*, 521 U.S. 203 (1997)	9
Aka v. *Washington Hosp. Ctr.*, 156 F.3d 1284 (D.C. Cir. 1998) (*en banc*)	9,10
Blow v. *City of San Antonio*, 236 F.3d 293 (5th Cir. 2001).....	11,12
Browder v. *Director, Dep't of Corrections*, 434 U.S. 257 (1978)	9,13
Chuang v. *University of Cal. Davis*, 225 F.3d 1115 (9th Cir. 2000)	12
Gordon v. *United Airlines, Inc.*, 246 F.3d 878 (7th Cir. 2001)	12
McDonnell Douglas Corp. v. *Green*, 411 U.S. 792 (1973)	1,2,5,11
Reeves v. *Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000)	2,6,7,8,10
Regents of Univ. Of Mich. v. *Ewing*, 474 U.S. 214 (1985)	9
St. Mary's Honor Ctr. v. *Hicks*, 509 U.S. 502 (1993)	10
Texas Dep't of Community Affairs v. *Burdine*, 450 U.S. 248 (1981)	5
University of Penn. v. *EEOC*, 493 U.S. 182 (1990)	9,10
Zimmerman v. *Associates First Capital Corp.*, 251 F.3d 376 (2d Cir. 2001).....	11

TABLE OF AUTHORITIES—Continued

	Page
STATUTORY PROVISIONS:	
42 U.S.C. § 1981	5
42 U.S.C. § 1981(a)	5
42 U.S.C. § 2000e	5
D.C. Code § 1-2501	5
D.C. Code § 1-2512	5
RULES:	
S. Ct. R. 10	1
Fed. R. Civ. P. 54(b)	6
Fed. R. Civ. P. 59(e)	7
Fed. R. Civ. P. 60(b)(6)	2

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BRIEF IN OPPOSITION

Respondents, The American University, *et al.*, hereby oppose the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

INTRODUCTION

This case meets none of the criteria warranting certiorari. *See* S. Ct. R. 10. The decision below does not conflict with a case decided by this Court, or by any of the Courts of Appeals. It does not present any unsettled issue of federal law. What it does present is a commonplace application of this Court's well-established analysis in *McDonnell Douglas*

Corp. v. *Green*, 411 U.S. 792 (1973), to the particular facts of this employment discrimination case.

Petitioner, Linz Audain ("Audain"), attempted to combine a full-time career as a law professor with respondent, The American University ("the University"), with the full-time pursuit of a medical degree. Audain's attempt was ultimately unsuccessful because his medical school enrollment was accompanied by a sharp decline in his performance as a law professor. This decline in performance caused the University to decline to reappoint Audain to a full-time tenure track position at its law school. Audain claimed discrimination and breach of contract, and this suit followed.

The courts below carefully examined the record developed by the parties and granted summary judgment to the University because Audain had failed to bring forward sufficient evidence from which a factfinder could conclude that the four legitimate, nondiscriminatory reasons provided by the University for its action were a pretext for discrimination. Undeterred, Audain filed a motion for reconsideration pursuant to Federal Rule of Civil Procedure 60(b)(6) on the basis of this Court's decision in *Reeves* v. *Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000). The courts below carefully considered that request and denied it after concluding, as detailed below, that *Reeves* failed to change the outcome of the case. It is that ruling that Audain seeks to challenge here.

The decision below is entirely consistent with *Reeves*. It furthermore presents no issue concerning the proper application of *Reeves* because, as the courts below correctly concluded, that ruling is not at all implicated by this case. Audain cannot show that the outcome of his case would be different if it were decided under the legal rule applied by any other court. The proper application by the courts below of well-settled legal principles under *McDonnell Douglas* and this Court's summary judgment jurisprudence presents no issue for review by this Court. The petition for certiorari should be denied.

COUNTERSTATEMENT

Factual Background. In 1994, the University, after full consideration, declined to reappoint Audain as a professor in its Washington College of Law. Audain had been promoted to Associate Professor in 1991, but in the period between that promotion and Audain's 1994 request for reappointment, his performance at the law school fell dramatically. The undisputed record below disclosed that Audain's teaching reviews, which had been excellent until 1991, began to decline in February 1992 and fell even further the following year. The quantity and quality of Audain's scholarship also fell. Audain wrote and published only one law review article in the two years after his 1991 promotion, and three of four reviewers of this single article concluded that Audain's work contributed nothing to the academic literature. In addition, Audain intentionally avoided service to the law school by refusing to chair the law school's critical Budget Committee, for which his business background provided particular expertise, reportedly to serve on a non-existent American Bar Association ("ABA") Committee on Haiti. *See* Pet. App. 20a-22a.

During this time period, the University had provided Audain with ample opportunity to improve. The University granted Audain's request for a reduced teaching load in the spring of 1993, purportedly for research and writing purposes. Pet. App. 20a. In addition, the University allowed Audain to teach the same two courses throughout his entire time at the law school, even though other faculty were ordinarily required to teach at least three or four different classes in any given year, which required a significantly greater amount of preparation time. Pet. App. 22a. Audain did not use these opportunities to increase the quantity of his published legal scholarship. Pet. App. 21a.

Not surprisingly, the decline in Audain's performance coincided with his undisclosed enrollment as a full-time medical student at Howard University in the fall of 1993. While enrolled as a full-time medical student, Audain enrolled in as many as 31 credit hours of medical school

classes per semester, without obtaining the University's permission or even informing it of his outside commitment. Pet. App. 20a. When the Acting Dean of the law school, Claudio Grossman, discovered Audain's medical school enrollment later in the fall of 1993, he immediately informed the ABA. *Id.* The ABA responded that because Audain was enrolled as a full-time student, the ABA would not count him as a full-time faculty member for accreditation purposes. *Id.* The ABA later put the law school on probation because of its student-faculty ratio. *Id.*

Meanwhile, Audain requested to be reappointed for the 1994-95 academic year. His request was initially reviewed by a three-member Subcommittee which released a report finding that Audain met the standard for reappointment in the areas of teaching, scholarship, and service to the University and the legal profession. Pet. App. 21a. The Subcommittee report, however, contained several negative reservations. These included Audain's lack of scholarly work; his "bar review" teaching style; his full-time medical school enrollment which interfered with his full-time teaching and research obligations; and a written complaint alleging sexual harassment filed against Audain the previous year by a female law student. *Id.* The Rank and Tenure Committee reviewed the Subcommittee's report, conducted its own investigation, and recommended that Audain be offered a one-year reappointment conditioned on his resignation from medical school. When Audain chose not to resign from medical school, his request for reappointment was denied. *See id.*

Dean Grossman then conducted an independent review of Audain's academic performance. He concluded that Audain failed to meet the requirement for scholarship because three of the four external evaluations of his scholarship were negative; failed to meet the law school's service requirements and; by enrolling full-time in medical school without the University's knowledge, had deprived the law school of a full-time faculty member for accreditation purposes. Pet. App. 20a, 22a. Based on these conclusions, Dean Grossman recommended that Audain's request for reappointment be

denied, and his recommendation was adopted. Accordingly, Audain was offered a terminal contract for the 1994-95 academic year. *Id.* at 22a.

Proceedings Below. In November 1994, Audain filed a complaint against the University alleging breach of contract, intentional interference with contractual relations, racial discrimination in violation of District of Columbia law and 42 U.S.C. §§ 1981, 1981(a) and 2000e, and discrimination on the basis of matriculation in violation of D.C. Code §§ 1-2501 and 1-2512.[1] The University filed a counterclaim against Audain for breach of contract. After the complaint was removed to the District Court, Audain actively conducted over seventeen months of discovery, including sixteen depositions. After the close of discovery, the University moved for summary judgment.

In two separate orders, the District Court granted summary judgment to the University on all of Audain's remaining claims. Pet. App. 14a, 19a. In considering Audain's discrimination claims, the District Court employed the burden-shifting analysis developed by this Court in *McDonnell Douglas*, 411 U.S. 792, and *Texas Dep't of Community Affairs* v. *Burdine*, 450 U.S. 248 (1981). Pet. App. 24a-25a. The court concluded that Audain had established a prima facie case. Pet. App. 26a. It then found that the University had provided four separate nondiscriminatory reasons for its action. In reviewing each of these reasons, the District Court concluded that Audain had failed to raise an issue of material fact concerning whether any of these reasons were a pretext for discrimination. First, Audain had enrolled as a full-time medical student while he was employed as a full-time professor. Pet. App. 27a. Audain did not inform the University of his enrollment in medical school, which jeopardized the University's accreditation with the ABA. *Id.* Second, Audain's published scholarship between 1991 (when he was promoted to Associate Professor) and 1994 (when he was considered for reappointment) consisted of a single article

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[1] Audain withdrew his claim brought under 42 U.S.C. § 2000e and for intentional interference with contractual relations.

that received mixed reviews from a panel of external reviewers, which the University assembled at Audain's request. Pet. App. 28a-29a. Third, Audain's "bar-review" style of teaching received mixed reviews and concerned the University. Pet. App. 30a-31a. Fourth, Audain failed to provide sufficient service to the University, particularly when he declined a request to chair the law school's Budget Committee on the pretense of service on an ABA Committee that never materialized. Pet. App. 31a. As for Audain's breach of contract claim, the District Court found "no evidence that the University violated Mr. Audain's employment contract," and therefore, there was "no genuine issue of material fact in dispute." Pet. App. 14a.

Audain obtained a Rule 54(b) certification from the District Court in order to appeal these interlocutory rulings.[2] The Court of Appeals affirmed the District Court's summary judgment rulings as to all of Audain's claims, Pet. App. 12a, and denied Audain's request for rehearing *en banc*. Pet. App. 10a. Audain then sought to file a petition for a writ of certiorari to this Court, which was out-of-time and therefore not accepted for filing.

The Motion for Reconsideration. Audain next filed, on October 12, 2000, a motion for reconsideration. Audain asserted that the District Court's summary judgment decisions, issued on June 25, 1998 and October 8, 1998, were inconsistent with this Court's decision in *Reeves* v. *Sanderson Plumbing Products, Inc.*, 530 U.S. 133, issued on June 12, 2000.

The District Court denied the motion for reconsideration. After noting that a motion for reconsideration under Rule 60(b) should only be granted in " 'extraordinary' " situations, the District Court proceeded to consider *Reeves*. Pet. App. 5a (quoting *Ackerman v. United States*, 340 U.S. 193, 202

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[2] The University's counterclaim for breach of contract was still pending before the District Court. *See* Pet. App. 17a. To bring this matter to a close, the University dismissed that claim on February 16, 2001.

(1950)).[3] The court concluded that *Reeves* "stands for the proposition that sufficient evidence for a reasonable jury to disbelieve a proffered nondiscriminatory justification in combination with a prima facie showing can be sufficient to sustain a jury finding of discrimination." Pet. App. 7a.

The District Court reasoned, however, that *Reeves* did not apply. While Audain had made a prima facie showing,

> the defendant here has produced evidence of reasoned doubt, through four legitimate explanations, about the merits of the plaintiff's reappointment to a tenure-track position. *The record does not contain sufficient evidence to demonstrate the falsity of the defendant's explanations, from which a reasonable jury could infer discrimination in this case under* Reeves.

Pet. App. 7a-8a (emphasis added). In other words, because Audain had failed to meet his burden of showing that the University's stated reasons were a pretext for discrimination, summary judgment was warranted without even reaching the question presented by *Reeves* of whether the plaintiff had produced evidence of discrimination in addition to his prima facie case. Because *Reeves* did not affect the outcome in Audain's case, the District Court denied the motion for reconsideration.

Audain appealed the denial of the motion for reconsideration. The Court of Appeals, through a different panel than had previously considered Audain's claims, summarily affirmed, "substantially for the reasons stated by" the District Court. Pet. App. 1a.

The petition for writ of certiorari followed.

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[3] The District Court rejected Audain's request for reconsideration pursuant to Fed. R. Civ. P. 59(e) because it was made more than 10 days after the entry of the judgment Audain sought to amend. Pet. App. 5a n.1.

REASONS FOR DENYING THE WRIT

I. THE DECISION BELOW DOES NOT CONFLICT WITH THIS COURT'S DECISION IN *REEVES*

The decision below does not implicate – and therefore is not inconsistent with – this Court's decision in *Reeves*. The rule in *Reeves* has no application here because Audain failed to bring forward sufficient evidence from which a factfinder could conclude that the University's reasons for its action were pretextual. Moreover, the controlling law of the District of Columbia Circuit at the time it affirmed summary judgment against Audain was entirely consistent with this Court's subsequent holding in *Reeves*. Therefore, the courts below were correct in refusing to reconsider the entry of summary judgment against Audain, and the decision below is in no way inconsistent with *Reeves*.

The issue decided in *Reeves* concerns the evidence required for a plaintiff to survive judgment as a matter of law – the same standard applied in deciding a motion for summary judgment – where the plaintiff has established a prima facia case *and* has also provided evidence that would permit a factfinder to conclude that the defendant's proffered reasons were pretextual. *See Reeves*, 530 U.S. at 140 ("We granted certiorari . . . to resolve a conflict among the Courts of Appeals as to whether a plaintiff's prima facie case of discrimination . . . *combined with sufficient evidence for a reasonable factfinder to reject the employer's nondiscriminatory explanation for its decision*, is adequate to sustain a finding of liability for intentional discrimination.") (emphasis added). Here that question was quite properly never reached, because the District Court – affirmed by the Court of Appeals – found that the evidence presented by Audain would not permit a reasonable factfinder to conclude that the University's four legitimate, nondiscriminatory reasons for declining to reappoint Audain were pretextual. *See* Pet. App. 1a, 7a-8a.[4]

[4] Audain so much as admits that *Reeves* does not apply, based on the findings made by the District Court. *See* Pet. 13. Much of the

In denying Audain's motion for reconsideration, the District Court carefully considered *Reeves* and concluded that it "does not change the outcome in this matter." Pet. App. 7a. The court's denial of reconsideration, based on its conclusion that the holding in *Reeves* did not change the standard used to decide Audain's discrimination claims, was correct. A legal standard that does not even apply to the case at issue cannot present the extraordinary circumstances necessary to support a motion for reconsideration. *See Agostini* v. *Felton*, 521 U.S. 203, 239 (1997) ("[i]ntervening developments in the law by themselves rarely constitute the extraordinary circumstances required for relief under Rule 60(b)(6)"). That the courts below were well within their discretion in denying the motion for reconsideration, by itself, provides ample reason to deny the petition for certiorari. *See Browder* v. *Director, Dep't of Corrections*, 434 U.S. 257, 263 n. 7 (1978) ("an appeal from denial of Rule 60(b) relief does not bring up the underlying judgment for review").

Even if, however, the underlying grant of summary judgment to the University were at issue here, and even if this Court's decision in *Reeves* were implicated, there would still be no reason to grant certiorari. When summary judgment was entered against Audain, the controlling law in the District of Columbia Circuit was, as it is today, entirely consistent with *Reeves*. *See Aka* v. *Washington Hosp. Ctr.*,

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petition is devoted, however, to arguing that the District Court was mistaken in finding that Audain had failed to bring forward any evidence that the University's stated reasons were a pretext for discrimination. In addition to failing to present a legal issue for this Court to review, Audain's argument is wrong. Audain offers nothing to contradict the findings of the District Court except his subjective evaluation of his own scholarly merit, inviting this Court to override improperly the University's carefully reasoned, *academic* decision. *See, e.g., University of Penn.* v. *EEOC*, 493 U.S. 182, 199 (1990) ("This Court itself has cautioned that 'judges . . . asked to review the substance of a genuinely academic decision . . . should show great respect for the faculty's professional judgment.'") (quoting *Regents of Univ. of Mich.* v. *Ewing*, 474 U.S. 214, 225 (1985)).

156 F.3d 1284, 1291 (D.C. Cir. 1998) (*en banc*).[5] In *Reeves*, this Court described the rule adopted by the District of Columbia Circuit in *Aka* as establishing that a "plaintiff's discrediting of [an] employer's explanation is entitled to considerable weight, *such that plaintiff should not be routinely required to submit evidence over and above proof of pretext.*" *Reeves*, 530 U.S. at 140 (citing *Aka*, 156 F.3d 1284) (emphasis added). Thus, *Reeves* did not change the prevailing law in the District of Columbia Circuit.

The Court of Appeals affirmed the grant of summary judgment to the University in March of 2000, well after it had decided *Aka*. Accordingly, even if Audain were correct that a rule inconsistent to *Reeves* was applied to his case – which, as discussed above, is clearly not the case – he would still fail to present an issue warranting certiorari because the governing legal rule in the District of Columbia Circuit was, and is, in no way inconsistent with *Reeves*. Audain's plea for this Court to review – on denial of a motion for reconsideration – the fact-bound application of the established legal rule to the particular situation presented by his case plainly does not warrant certiorari.[6]

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[5] In *Aka*, the District of Columbia Circuit rejected the "pretext plus" standard, explaining that it "reject[ed] any reading of *Hicks* under which employment discrimination plaintiffs would be routinely required to submit evidence over and above rebutting the employer's stated explanation in order to avoid summary judgment." *Aka*, 156 F.3d at 1291 (citing *St. Mary's Honor Ctr.* v. *Hicks*, 509 U.S. 502 (1993)).

[6] Audain's assumption – for it is never explained how one could reach such a conclusion – that *Reeves* somehow changes the law applicable to his claim for breach of contract or "matriculation discrimination" is wholly without support in law or logic.

Audain's argument that *Reeves* somehow affects the standards applicable to discovery borders on the absurd. Moreover, as a factual matter, these claims have no basis in the record. Audain never raised below any issue concerning the alleged "spoliation of evidence." Pet. 19. In addition, in accord with *University of Penn.* v. *EEOC*, the University produced to Audain voluminous files from its peer review committee. The District Court's decision that the written claim of sexual harassment made against Audain was

II. THE DECISION BELOW DOES NOT CONFLICT WITH THE DECISIONS OF THE OTHER COURTS OF APPEAL

Nor is Audain correct to argue that the outcome of his case would be different if it had been decided by another of the Courts of Appeals. Pet. 13-14. As an initial manner, any inconsistency between the Courts of Appeals in the application of *Reeves* simply is not raised by this case because, as discussed above, the failure of Audain to present evidence to show that the University's reasons for its employment action were pretextual means that the rule in *Reeves* has no application here. *See Zimmerman* v. *Associates First Capital Corp.*, 251 F.3d 376, 381-82 (2d Cir. 2001) (asserting Courts of Appeals are employing different formulations in applying *Reeves*).

Moreover, none of the Courts of Appeals has adopted the rule Audain suggests, *i.e.*, that any plaintiff who establishes a prima facie case thereby automatically raises a genuine issue of material fact sufficient to preclude summary judgment in favor of the employer. The single case directly relied on by Audain for this proposition, *Blow* v. *City of San Antonio*, 236 F.3d 293, 296-97 (5th Cir. 2001), actually reaffirms and *implements* the traditional burden-shifting framework established by this Court in *McDonnell Douglas*, and properly applied by the courts below. In *Blow*, the Fifth Circuit did not end its summary judgment inquiry at plaintiff's proffer of a prima facie case as Audain asserts. To the contrary, the court explicitly examined whether the employer's proffered nondiscriminatory rebuttal was believable and reversed summary judgment in favor of the employer because the plaintiff "presented sufficient evidence to create a material

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not comparable to any other such claim made against a law school faculty member, Pet. App. 43a-44a, is a factual determination which certainly does not warrant review by this Court.

issue of disputed fact *as to whether the employer's explanation was false*."). *Id.* at 298 (emphasis added).[7]

Nor do the other cases cited in the petition support Audain's argument. *See* Pet. 15 & n.9. While the Ninth Circuit has interpreted *Reeves* to mean that a plaintiff who has established a prima facia case may, in some instances, escape the entry of judgment against him as a matter of law without facing an additional burden *of production*, even there the Court of Appeals clearly echoed this Court's earlier decisions, stating that "the plaintiff always retains the burden *of persuasion*." *Chuang* v. *University of Cal. Davis*, 225 F.3d 1115, 1127 (9th Cir. 2000) (emphasis added); *see also Gordon* v. *United Airlines, Inc.*, 246 F.3d 878, 886 (7th Cir. 2001). That is, in some cases evidence of a prima facie case will be so strong as to also demonstrate pretext. That is not the case here.[8] In sum, Audain fails to demonstrate a conflict in the legal standards applied by the Courts of Appeals that would change the outcome of this case and therefore certiorari should be denied.

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[7] In fact, Audain's argument is directly at odds with language in *Blow* explaining that the *employer* may be "entitled to judgment as a matter of law if the record conclusively revealed some other, nondiscriminatory reason for the employer's decision, or if the plaintiff created only a weak issue of fact as to whether the employer's reason was untrue . . . ." *Blow*, 236 F.3d at 298 n.3. This portion of *Blow* directly supports the decisions below.

[8] The facts in *Chuang* stand in marked contrast to the facts here and provide no support for Audain's argument concerning pretext. *Cf.* Pet. 15. In *Chuang*, the plaintiff demonstrated "extraordinary" qualifications as a microbiologist and academic who was widely published and a leading researcher in his field. 225 F.3d at 1127. The plaintiff in *Chuang* was forcibly evicted from his research space while still employed by the University, and that eviction compromised his research and continued grant funding. *Id.* at 1125. Audain's qualifications were far from extraordinary and he refused to vacate his office at the University *months* after his teaching contract had expired, and not until the University filed a motion for a temporary restraining order. Furthermore, after his terminal contract had expired, Audain, among other things, improperly held himself out as being affiliated with the University and used University space for his own personal business activities.

III. THIS CASE INVOLVES NO UNSETTLED ISSUE OF FEDERAL LAW

Finally, certiorari is not warranted here because the petition fails to raise any unsettled issue of federal law. Whether Audain's motion for reconsideration was properly denied fails to raise any unsettled legal issue. The remainder of the questions presented by Audain would require a close inquiry by this Court into whether the District Court erred in its discovery rulings, whether the District Court "fail[ed] to look at the entire record" with regard to Audain's breach of contract claim, and the proper interpretation of law peculiar to the District of Columbia concerning "matriculation" discrimination. None of these questions are properly presented by Audain's appeal of the denial of his motion for reconsideration. *See Browder*, 434 U.S. at 263 n.7. Moreover, rather than asserting that any of these rulings raise an unsettled issue of federal law, Audain merely argues that they were wrongly decided on the facts of this case. The rulings by the courts below on these issues, in addition to being correct, raise no unsettled issue of federal law and plainly do not warrant review by this Court.

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

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